No. 10-86

Supreme Court, U.S.
FILED
OCT 28 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JUDY JOHNSON and JAMES EDWARDS,

Petitioners,

v.

ESTATE OF TERRY GEE, JR., DECEASED,
BY SPECIAL ADMINISTRATOR, THOMAS BEEMAN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF

JAMES S. STEPHENSON
WAYNE E. UHL*
**Counsel of Record*
STEPHENSON MOROW & SEMLER
8710 N. Meridian Street, Suite 200
Indianapolis, Indiana 46260
317/844-3830
wuhl@stephlaw.com
jstephenson@stephlaw.com

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION AND REPLY TO STATEMENT OF THE CASE 1

REPLY ARGUMENT 3

I. There is a circuit split as to whether an officer violates the Fourteenth Amendment by refusing to overrule treatment decisions of medical staff, as occurred in this case 3

II. Respondent concedes that the lower courts failed to address the "clearly established" prong of the qualified immunity analysis, and respondent has failed to cite a case decided before March 2005 holding that correctional officers violate the Fourteenth Amendment by failing to overrule medical professionals 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....11

Berry v. Peterman, 604 F.3d 435 (7th Cir. 2010) 5, 8

Board v. Farnham, 394 F.3d 469 (7th Cir. 2005).....10

Davis v. Marion County Sheriff's Department, 2010 WL 3893813 (S.D. Ind., Sept. 29, 2010).....4

Estelle v. Gamble, 429 U.S. 97 (1976).....6, 10, 11

Farmer v. Brennan, 511 U.S. 825 (1994) 6

Iko v. Shreve, 535 F.3d 225 (4th Cir. 2008).....6

James v. Pennsylvania Dept. of Correction, 230 Fed.Appx. 195 (3rd Cir.), *cert. denied*, 552 U.S. 1067 (2007).....4

Johnson v. Doughty, 433 F.3d 1001 (7th Cir. 2006) 4, 5, 7

Meloy v. Bachmaier, 302 F.3d 845 (8th Cir. 2002) 4, 7

Miltıer v. Beorn, 896 F.2d 848 (4th Cir. 1990) 4, 6, 7

Pearson v. Callahan, 555 U.S. ___ (2009).....9

Ralston v. McGovern, 167 F.3d 1160 (7th Cir. 1999) 10

Saucier v. Katz, 533 U.S. 194 (2001).....9, 10, 11

Spruill v. Gillis, 372 F.3d 218 (3rd Cir. 2004).....4, 6, 7, 8

Townsend v. Jefferson County, 601 F.3d 1152 (11th Cir. 2010).....5, 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Cook County, Ill., 2010 WL 3273501 (N.D. Ill., Aug. 17, 2010) 4

Walker v. Benjamin, 293 F.3d 1030 (7th Cir. 2002) 10

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. IV 10, 11

U.S. Const., amend. VIII 5

U.S. Const., amend. XIV .....*passim*

RULES OF COURT

Fed. R. App. P. 32.1 4

INTRODUCTION AND REPLY TO STATEMENT OF THE CASE

Respondent asserts that Johnson and Edwards' "entitlement to rely on medical staff evaporates if the risk is obvious" (Resp. Br. 11). Relying upon opinions of other laypersons that Gee required hospitalization, respondent argues that Johnson should have overruled the determinations of medical staff. This case is therefore an excellent vehicle for review to determine whether a correctional officer violates the Fourteenth Amendment by following and failing to override treatment decisions by medical staff, even if the officer possesses knowledge of a risk that is "obvious" to others.

That said, respondent's statement inaccurately conflates the knowledge of medical staff and other laypersons with the knowledge of Capt. Johnson and Sgt. Edwards. Johnson and Edwards' notice of Gee's condition was confined to a limited time span beginning the late evening of March 30, 2005; Gee was promptly taken to the hospital the following morning when Edwards arranged for his transport after receiving a directive from the nurse practitioner. Respondent's inference that the officers had the same knowledge as medical staff and other prisoners is not supported by the record or the evidence relied on by the district court.

For example, respondent states that nurse Estes assessed Gee at 9:30 p.m. on March 30, "with Johnson present," and that "[i]nstead of ordering that Gee

be evacuated to the hospital, Johnson had him placed in a medical segregation" (Resp. Br. 5, citing App. 24). The district court, however, found the evidence to show that nurse Estes examined Gee at 9:30 p.m., checked his blood sugar level, gave him a double dose of insulin and a double dose of an antibiotic as ordered by the nurse practitioner, and *then* summoned Capt. Johnson to the cell block to direct that Gee be placed in medical segregation for medical observation. As directed, "Johnson approved the transfer to segregation." (App. 23-24.)

Another example is respondent's assertion that on March 29, nurse Anderson and Sgt. Edwards saw Gee and both had to catch him before he fell to the floor. (Resp. Br. 4, citing App. 21.) There was no evidence that Edwards was present. (*See* App. 21.)[1]

Despite these discrepancies, it is not in dispute that Johnson and Edwards knew that Gee was sick, that other prisoners told Johnson he needed to go to the hospital, and that his medical condition was "serious" from a constitutional point of view. They also observed that he was assessed and treated by medical staff, and they carried out directives of medical staff that Gee be placed in medical segregation and, later,

---

[1] The district court noted that it had ignored assertions made by respondent that were unsupported by citation to the summary judgment evidence, constituted opinions or legal conclusions, or were "statements or opinions incorrectly attributed to a witness who did not make the statement or opinion" (App. 17 n 3.)

taken to the hospital on a non-emergency basis. That being so, the case provides an ideal basis for the Court to determine whether a correctional officer, who knows of a serious medical condition, can be liable for violation of the Fourteenth Amendment where the inmate is undergoing treatment by medical staff and the officer carries out directives from medical staff.

REPLY ARGUMENT

I. There is a circuit split as to whether an officer violates the Fourteenth Amendment by refusing to overrule treatment decisions of medical staff, as occurred in this case.

The nature of the split among the circuits is such that officers Johnson and Edwards would have received summary judgment in some circuits, but not in others. Based on varying jury instructions that might be given, Johnson and Edwards might be found liable in some circuits but not in others. Such differences in outcome are intolerable. Review by this Court is required to determine a single standard and alleviate the disparate standards being applied across the country.

The lower court decision contributes to the split among the circuits even though it is a "non-precedential order." The split exists even without the decision in this case, which relied on a published

decision.[2] But a decision labeled as "nonprecedential" under a circuit's local rule must be considered in evaluating a circuit split because the decision is still a nationally citable opinion. Fed. R. App. P. 32.1. In fact, the opinion has been cited already by two district courts.[3] In any event, a court cannot insulate an incorrect decision from review by designating its opinion as "nonprecedential."

Petitioners have set forth the divergent court of appeals decisions on this question (Pet. 9-14). The disparate holdings can be summarized:

- Non-medical correctional staff are entitled to rely on decisions of trained medical staff, without qualification. *Miltier v. Beorn*, 896 F.2d 848, 854-55 (4th Cir. 1990); *Meloy v. Bachmaier*, 302 F.3d 845, 849 (8th Cir. 2002).
- Correctional officials are entitled to rely on medical staff absent a reason to believe that medical staff is not treating or is "mistreating" a prisoner, *Spruill v. Gillis*, 372 F.3d 218, 236 (3rd Cir. 2004), and in the case of suspected mistreatment, need only verify with medical staff that the prisoner is being treated, *James v. Pennsylvania Dept. of*

---

[2] App. 12, citing *Johnson v. Doughty*, 433 F.3d 1001, 1011 (7th Cir. 2006).

[3] *United States v. Cook County, Ill.*, 2010 WL 3273501 (N.D. Ill. Aug. 17, 2010); *Davis v. Marion County Sheriff's Dept.*, 2010 WL 3893813 (S.D. Ind. Sept. 29, 2010).

Correction, 230 Fed.Appx. 195, 198 (3rd Cir.), *cert. denied*, 552 U.S. 1067 (2007).

- Correctional officers can rely on medical staff unless they know that medical staff "grossly misjudged" the prisoner's condition, ignored a serious medical need, or had a history of deliberate indifference. *Townsend v. Jefferson County*, 601 F.3d 1152, 1159 (11th Cir. 2010).

- The Seventh Circuit holds that correctional personnel can generally rely on medical staff, *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010), except "where it would be evident to a layperson that a prisoner is receiving inadequate or inappropriate treatment," *Johnson v. Doughty*, 433 F.3d 1001, 1011 (7th Cir. 2006). Or, as it held in this case, in the "rare" case "where a layperson would recognize that [the prisoner] received treatment so inadequate that [the officers'] deference to the nurses was unreasonable." (App. 12.)

These holdings cannot be harmonized by distilling them to a core principle of deliberate indifference to an obvious risk. The Seventh Circuit in particular charges the officer with the obligation to determine whether treatment being rendered is "inadequate" or "inappropriate," and whether deference to nurses is "unreasonable," concepts foreign to this Court's Eighth and Fourteenth Amendment jurisprudence.

The Court has strictly adhered to its holdings that the Constitution is violated only by deliberate indifference to a known risk, not by negligence or malpractice which are the province of state-law tort claims. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) ("deliberate indifference describes a state of mind more blameworthy than negligence"); *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) (proper vehicle for disputes of medical judgment is state-law tort claim).

Nor does this case present the extreme situation that would be actionable in any circuit, that is, where an officer knows that medical staff is denying treatment of a serious medical condition. That was the case in *Iko v. Shreve*, 535 F.3d 225, 242-43 (4th Cir. 2008), where officers allegedly doused a prisoner with pepper spray and then watched him collapse after a nurse provided no treatment. The court in *Iko* distinguished precedent such as *Spruill* and *Miltier* "because it is undisputed that Iko received *no* medical treatment whatsoever." *Id.* at 242.

Here, by stark contrast, Gee received considerable medical treatment from nurses and a nurse practitioner, who assessed him and gave him medication several times before he was hospitalized. For a time, in addition to treating his high blood sugar, they believed he had the flu. They directed the officers to place Gee in medical segregation and later take him to the hospital on a non-emergency basis.

Because Gee was receiving medical treatment, the officers were not constitutionally required to substitute their own judgment, or the judgment of other prisoners, for that of the nurses and nurse practitioner.

In the Third, Fourth and Eighth Circuits, Johnson and Edwards would not be liable because they knew Gee was receiving medical care. In the Eleventh Circuit, the officers probably would not be liable because there is no evidence that they believed medical staff "grossly misjudged" or ignored Gee's condition, or had a history of deliberate indifference. In the Seventh Circuit, however, the officers are subject to potential liability because (as the district court held), it is "conceivable" that they "should have recognized" the "potential" need for immediate care at a hospital (App. 36); or (as the court of appeals held) because the treatment Gee was receiving was so "inadequate" or "inappropriate" that deferring to the nurses was "unreasonable" (App. 12, citing *Johnson*).

Cases holding that prison officials may defer to medical professionals did not rest, and cannot be distinguished, on the basis that the officials were "distant" or supervisory, as respondent argues (Resp. Br. 12). *Miltier* involved wardens who "closely monitored" the plaintiff's health and were aware of his deterioration. 896 F.2d at 854-55. *Meloy* involved a medical administrator who personally spoke to the prisoner but followed medical advice not to order a medical device for him. 302 F.3d at 849. *Spruill* involved a housing unit manager to whom the prisoner reported

his injuries. 372 F.3d at 223-24. *Townsend* involved line officers to whom the prisoner reported her medical issues. 601 F.3d at 1154. *Berry* involved the administrator of a jail to whom the prisoner directly pleaded for dental care and who actually looked at the prisoner's teeth. 604 F.3d at 438-39. In all of these cases, there was no question that the defendant prison official, like petitioners here, had actual and direct knowledge of the prisoner's medical condition but deferred to medical staff.

There is a clear split of authority among the circuits that would result in different outcomes depending on where the case is filed. The facts of this case afford an excellent vehicle to determine the circumstances under which a correctional officer can be found liable for violating the Constitution, based on his or her actual knowledge of a serious medical condition, by failing to overrule medical staff who have provided treatment.

II. Respondent concedes that the lower courts failed to address the "clearly established" prong of the qualified immunity analysis, and respondent has failed to cite a case decided before March 2005 holding that correctional officers violate the Fourteenth Amendment by failing to overrule medical professionals.

Respondent concedes that both lower courts "did not specifically address" whether it was clearly established law that the petitioners had a constitutional

obligation to overrule the treatment decisions of medical staff, but contends that the failure "is of no legal import." (Resp. Br. 14.) Respondent is wrong both because the lower courts ignored this Court's guidance on analysis of qualified immunity, and because even respondent is unable to cite a single pre-2005 case that clearly established an officer's duty to overrule medical staff who are providing treatment.

Assessing the state of the law at the time of the alleged violation is not only important, but goes to the heart of the qualified immunity defense. The essence of qualified immunity is whether the defendant officials violated clearly established law. *Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."). Under *Pearson v. Callahan*, 555 U.S. ___ (2009), the issue of whether the defendant official violated the law as clearly established at the time of the conduct in question can be avoided only if the court finds that the conduct would not violate federal rights even at present.

Of course, the lower courts' failure to assess the state of the law would be of no legal import if respondent were able to show that controlling case law in March 2005 established that correctional officers have a duty to overrule medical professionals if the officers believe that their treatment decisions are "unreasonable" or "inappropriate." Despite several opportunities, respondent has failed to do so.

As is so often the case, respondent takes refuge in cases holding that the Constitution is violated by deliberate indifference to a serious medical need (Resp. Br. 16-17), a quite general proposition that has been the law since this Court's 1976 decision in *Estelle v. Gamble*. As demonstrated by the varying decisions of the courts of appeals, that general proposition is insufficient to establish an officer's obligation to override decisions of medical staff.

All of the pre-March 2005 medical care cases cited by respondent involved denying or intentionally delaying medical care, and none of them involved deference to decisions of medical staff. In *Walker v. Benjamin*, 293 F.3d 1030 (7th Cir. 2002), the prisoner alleged that a nurse and doctor refused to provide pain medication. In *Board v. Farnham*, 394 F.3d 469, 485 (7th Cir. 2005), the prisoner alleged that officers flatly refused to give him his prescribed inhaler for asthma symptoms. And in *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999), an officer allegedly refused to give the prisoner, who suffered from cancer, pain medication that had been prescribed for him. These cases fall far short of putting Johnson and Edwards on notice, in March 2005, that deferring to and following the instructions of nurses and a nurse practitioner who were providing medical treatment could subject the officers to liability.

The Court has cautioned against using broad constitutional principles to find that a constitutional right was clearly established on the facts of a particular case. Thus in *Saucier*, the Fourth Amendment's

bar on unreasonably excessive force during an arrest did not clearly establish that the force used by the officer in that case was excessive. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Fourth Amendment's requirement of probable cause and exigent circumstances for warrantless searches was too general to establish that the search at issue in that case was illegal.

"The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. So the question is not whether Johnson and Edwards would have understood that they could not intentionally deny or delay medical care, but whether they would have understood, in March 2005, that they were required to look over the nurses' shoulders and make an independent assessment of Gee's condition, taking into account his cellmates' opinions, and send him to the hospital on their own initiative.

The deliberate indifference standard is not violated even where doctors disagree over the correct treatment, so long as medical judgment is exercised. *Estelle v. Gamble*, 429 U.S. at 106. Thus it should be clear that even where an officer disagrees with a nurse's medical judgment, the officer is not deliberately indifferent by deferring to the nurse.

Petitioners have conceded that Gee had a serious medical need. The undisputed evidence is that he was receiving treatment from the jail's medical staff. There is no allegation that the petitioners in any manner denied, delayed or interfered with Gee's access to that medical care. Rather, the petitioners complied with every directive issued by the medical staff.

Even a cursory review of the cases on point up to March 2005 shows that, at most, an officer was constitutionally obliged to override medical staff only if it was obvious that medical staff were refusing to treat the prisoner, or were plainly incompetent (that is, had "grossly misjudged" the prisoner's condition). Indeed, a reasonable officer might have concluded that overriding medical staff could later be interpreted as interference with medical staff's treatment decisions, subjecting the officer to liability. Even now, in light of the Seventh Circuit's more recent jurisprudence, an officer would be confused about whether she is confronted with one of the "rare" cases in which medical care is "inappropriate" and it would be "unreasonable" to defer to medical staff.

Qualified immunity exists to protect the officer from uncertainty about how courts will apply the rules to a given situation. It was a serious and significant error for the Seventh Circuit to skip assessment of the state of the law in March 2005. Regardless of the standard that should be applied to such a situation, Johnson and Edwards are entitled to that assessment, and because the Seventh Circuit has

twice declined to do so, this Court should grant certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES S. STEPHENSON
WAYNE E. UHL*
*Counsel of Record
STEPHENSON MOROW & SEMLER
8710 N. Meridian Street,
Suite 200
Indianapolis, Indiana 46260

Counsel for Petitioners

Dated: October 26, 2010